IN THE CHILDREN'S COURT OF NEW SOUTH WALES
AT PARRAMATTA

JUDGE MARK MARIEN SC
PRESIDENT

14 September 2010

No. 1101/09-002

IN THE MATTER OF: "TROY"

REASONS FOR JUDGMENT

1. This is an application under s90 (1) of the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act) for leave to bring an application to rescind orders made by the Children's Court on the 28 April 2005. The applicant, Ms "Fiona Dempsey", is the mother of "Kyle Dempsey" and "Troy Dempsey" who were born in May 1997 and April 2001 respectively. The father of the children is Mr "Edward Lewis".

2. On 28 April 2005 the court made consent orders pursuant to s79 (1)(b) of the Care Act that all aspects of parental responsibility in respect of both children be allocated to the Minister until the child obtains the age of 18 years and that pursuant to s81 (1)(b) of the Care Act all aspects of parental responsibility be the sole responsibility of the Minister. A further order was made that the Department file a report under s82 (2) within 9 months of the date of the orders.

3. In her Application the mother states that upon obtaining leave under s90 she seeks an order "varying or discharging" the orders made on 28 April 2005 and 18 April 2008 (sic) with respect of the child "Troy" and an order that parental responsibility for "Troy" be allocated to her until he obtains the age of 18 years.

4. The application for leave is opposed by the Director General and by Mr McCaffrey who appears as the independent legal representative for the child.

Background

5. The mother has two other children "Heather" born in May 1995 and "Tracey" born in December 2005. "Heather" resides with her maternal grandparents who have parental responsibility for her. "Tracey" has remained in the care of the mother.

6. Following the court making the consent orders on 28 April 2005 the mother filed a s90 application on 13 September 2006 in which she sought restoration of both "Kyle" and "Troy" to her care. On 26 February 2007 the Children's Court refused the mother's application for leave and subsequently, on 4 June

2007, the mother appealed to the District Court against that refusal. On 12 December 2007 his Honour Judge Coorey upheld the mother's appeal, granted her leave under s90 and remitted the proceedings to the Children's Court for hearing. On 10 June 2008 the children participated in a Children's Court clinician's assessment with psychologist Ms Jane Irving who prepared a report dated 7 June 2008. That report is contained on the court file. Ms Irving states in that report that when she interviewed "Troy" she asked him if there was anyone in his old family he would like to keep in touch with. She states that "Troy" quickly retorted "NO" and looked very embarrassed with high colour to his cheeks. She states that "Troy" also firmly stated that he did not want to see his brother "Kyle". In the report Ms Irving expresses the opinion that to disrupt or disturb "Troy's" current foster placement would place him at significant risk of psychological harm. In relation to the mother, Ms Irving states in her report that she does not have the skills necessary to meet the specialised needs of "Kyle" and "Troy".

7. When the matter was returned to the Children's Court on 28 October 2008 the mother no longer sought restoration of the children to her care and consented to orders being made pursuant to s86 of the Care Act that she have minimum supervised contact with the children for a period of 2 hours once per month and at such further and other times as may be agreed to by the mother and the Department.

8. On 30 June 2009 the mother lodged a further s90 application seeking restoration of the children to her care. On 15 September 2009 the application with respect to "Troy" was dismissed and on 29 September 2009 the mother withdrew her application with respect to "Kyle". The present application is therefore the mother's third s. 90 application with respect to "Troy".

9. Following the making of the long term orders by the Children's Court on 28 April 2005, both children were placed in a medium term foster placement and on 9 October 2005 they were placed with long term carers. That placement subsequently broke down with respect to "Kyle" who had extremely challenging behavioural problems. He was placed in a number of further foster placements which also broke down, however, in April 2009 he was placed in a specialised one-on-one placement with St Saviours Intensive Support Services where he has remained. Reports are that he is thriving in that placement.

10. The child "Troy" has also demonstrated ongoing and extremely challenging behaviours. In September 2009 he had emergency respite after his carers rang Community Services in Albury relinquishing care of "Troy". However, in the following days the carers contacted Community Services and requested that "Troy" be returned to their care which he was after spending 6 days in respite. In February 2010 "Troy's" placement with his long-term carers broke down as they were unable to cope with his challenging behaviours and they had concerns that their own child was being placed at risk by being exposed to "Troy's" behaviours.

11. On 23 February 2010 “Troy” undertook a very short-term placement with a Community Service’s foster carer in the Blue Mountains while appropriate long-term foster care placements were investigated. He remained in this placement until 18 May 2010. On that day “Troy” absconded from his placement and was reported as missing to the Police. He was later located on a train returning to his carers home after allegedly attempting to travel to Albury to return to his previous carers. When located “Troy” was taken to his new carers’ home. On Wednesday 19 May 2010 “Troy” again absconded from his carers’ home and on this occasion case workers and Police located him at a train station. It is reported that “Troy” ran on to the tracks placing himself at risk of significant harm and that he assaulted case workers by kicking and threatening a case worker with a sword. On 21 May 2010 he assaulted a caseworker including kicking and hitting the caseworker with an implement. He also threatened to kill a caseworker whilst holding a knife. On 25 May 2010 Police took “Troy” to the Children’s Hospital Westmead after they had followed him along train tracks. The Police believed this was an attempt by “Troy” to self-harm, however, the psychiatrist at the Children’s Hospital Westmead, Dr Lucy Chapman, said his behaviour “*was a response to his current situation*”. “Troy” remained in hospital for one week for observation. Dr Chapman made a discharge diagnosis of Adjustment Disorder with mixed disturbance of emotions and conduct. On 9 July 2010 Dr Chapman advised the Department by email that she is of the opinion that it would be of great detriment to “Troy’s” ongoing psychological and emotional health for him to return to the care of, or have contact with, his mother. “Troy” has had ongoing problems with soiling his pants. His former carer reported that this happened up to 4 times on some days, however this was later reported to approximately every second day. He has also experienced ongoing intermittent bed-wetting.

12. Following “Troy’s” admission to Westmead Children’s Hospital in May 2010 his carers advised the Department they were no longer able to provide a placement for him. He is currently residing in a one-on-one intensive support residential placement with Allambi Services. The placement is staffed 24 hours including two-to-one staff to client ratio between 4.30pm and 5pm the time that has been identified as high risk for “Troy”. There is also 24-hour casework and case manager support within this placement. Allambi Youth Services provide intensive residential placements for young people with high and/or complex support needs.

13. Because of ”Troy’s” demonstrated ongoing challenging behaviours, Ms Sarah Chaplin from Quovus prepared a behavioural assessment report on “Troy” in June 2010. Ms Chaplin states in her report that “Troy” prefers to use the name “Michael”. Ms Chaplin states that he was placed in the care of the Department in June 2004 when he was 3 years of age. She states that Departmental file notes indicate that he experienced family break down at an early age; his mother and father had issues with drugs and alcohol; his parents separated when he was very young causing he and his siblings to experience homelessness and transience; he witnessed domestic violence; supervision was inadequate and his medical needs were not met. Ms Chaplin states that “Troy” does not currently have contact with his mother or his

father. She states that with respect to"Troy's" recent placement with Allambi Youth Services "Troy" reports that he likes the staff and his new home stating that it is "*awesome*". She says that he reports to like fishing and having a lake near by. Ms Chaplin states that the aim is to settle "Troy" while in residential care and in the near future to transition him back into foster care in the Newcastle area through Allambi Youth Services. Ms Chaplin says that "Troy" was reported by staff to be settled in the first week, however, later there were a few reported incidents of absconding, soiling and verbal and physical aggression towards staff. Ms Chaplin expresses the opinion that "Troy" requires a consistent routine with firm boundaries and that when he feels overwhelmed or anxious he will display challenging behaviours. She says that he has difficulty interacting and maintaining peer relations but he enjoys sports and has previously been involved in football and cub scouts.

14. Under the heading "*Relationship with Family*" Ms Chaplin states that at the present time there are no contact arrangements in place as "Troy" is refusing to have contact with any of his birth family. She states that "Troy" has had no contact with his mother in 2 years. It is to be noted that he has not been in his mother's care since June 2004. She says that contact should continue to be encouraged slowly as "Troy" becomes very distressed when discussing contact. Ms Chaplin states that when "Troy" moves house or into a new foster placement he will require significant support before, during and after the transition. She says that supports and routines must be in place with set boundaries. She says that he will require close supervision and support throughout the process and that any change to his routine causes him to become very anxious and distressed. Ms Chaplin expresses the opinion that "Troy" demonstrates little insight into environmental risks and appears to be unable to evaluate dangerous situations. She says he is at risk from injury and/or exploitation from others and requires full-time supervision and support in order to keep him safe. She states that "Troy's" soiling is of concern and she highly recommends a full medical review by suitably qualified professionals and the development of a health care plan for "Troy".

15. Ms Chaplin states in her report that from a clinical perspective it is highly recommended that as few changes as possible occur for "Troy". She says that too many changes will endeavour to unsettle him and further enhance his sense of instability. Further, any change in his current support model (one-on-one) should be carefully planned with "Troy" being informed and transition plans developed. She states that a suitable foster carer match will require the carer to be experienced in caring for high needs children or, if this is not possible, the carer will require intensive training prior to "Troy's" transition into their care and during the initial stages of the new placement. Ms Chaplin states that this will assist in supporting the carer to make the placement sustainable and long term.

16. Ms Chaplin expresses the opinion that regardless of the specific support model adopted for "Troy" it will be critical that communication across all services and his support team/carers is well managed, efficient and responsive. She says that due to the complexity of this case, it is

recommended that a clinician be allocated to ensure best clinical practice is followed.

The application

17. The mother has filed two affidavits in support of her application on 8 June 2010 and 3 August 2010 respectively. The mother also relies on the affidavit of her mother, "Norelle Dempsey", filed on the 3 August 2010.

18. In her affidavit filed on 8 June 2010 the mother deposes that since orders were made on 28 April 2005 and 28 October 2008 "*there have been a number of significant changes in the relevant circumstances"*. She states that she has been provided with a housing subsidy for the past 4 years which has allowed her to live in the Allambi area for the past 2 years and she states that she is in receipt of a single parent pension and she is able to pay all her household bills in a timely manner. The mother deposes that she has the capacity to care for "Troy" with the support of her family. She states she does not work and is available to care for "Troy" at all times when he is not attending school. She states that she does not consume any illegal drugs or substances and has never done so.

19. It is to be particularly noted, however, that the mother does not, in her filed affidavits, state that she has now acquired the necessary skills to address and cope with "Troy's" high needs and his extreme behavioural problems. What she does say is that she will complete any parenting skills courses and engage in any counselling which the Department wishes her to undertake, that she will comply with the advice of professionals with respect to "Troy's" care and welfare and that she will comply with all undertakings required by the court.

20. The mother deposes that following the making of orders on 28 October 2008 she was only allowed one contact visit with "Troy" in late 2008. She states that about two weeks after that contact she had a telephone conversation with "Troy" during which he said, "*I love you mum*". The mother further deposes that a Departmental caseworker at the Penrith Office said to her after her telephone conversation with "Troy", *"'Troy' doesn't want to speak to or see you*". The mother states she has not been allowed any further contact with "Troy" since that telephone conversation with him in late 2008.

21. The mother states that after "Troy" returned to Sydney from Albury in early 2010 (following his long-term foster placement in Albury breaking down) she became extremely distressed when she learnt that "Troy" had run away from his new Sydney placement several times and on one occasion was found wandering the streets near the train station in the pouring rain. The mother says that she has serious concerns for the health and safety of "Troy" and she states that the Department has never kept its promise to arrange for her to have contact with him.

22. The mother states that she has been diagnosed with "separation anxiety" as a consequence of being separated from her children but that she has not been

diagnosed with a mental illness. She states that she attended counselling in 2008 to 2009 with Dr Rebecca Braid of Eden Therapy Services. The report of Dr Braid dated 11 June 2009 is annexed to the mother's affidavit. Dr Braid states that her report was prepared following the mother making a successful application to the Victim's Compensation Tribunal (VCT) due to her childhood abuse. The mother was awarded full counselling compensation "*to work on her history and to improve her life skills and functioning in the community*". Dr Braid states that the mother has been attending all her booked appointments "*and worked very hard to understand her own history and its contribution to her experiences as a parent and a community member*". Dr Braid states in her report that following the counselling the mother "*has improved her life skills and her understanding of herself and her role as a parent. Her daughter "Tracey" is benefiting from her parenting and is performing at her kindy as expected for a child of her age. Ms "Dempsey" has a stable home environment for "Tracey" and is wanting the return of her two children currently in the care of the Department. Her current anxiety would be greatly reduced with their return*".

23. It is significant that the report of Dr Braid, which was prepared following the mother making a successful application to the VCT, does not assess the ability and capacity of the mother to care for "Troy" with his high needs and very challenging behaviours. In particular Dr Braid has not assessed those matters in the context that "Troy" has continued to express his wish not to have contact with his mother.

24. In her affidavit filed on 3 August 2010 the mother, in responding to the affidavit of Departmental case worker Imke Mohr, states that she is no longer in a relationship with the father of the children, Mr "Edward Lewis", and that she has not had any contact with him for about 4 to 5 years. She states that she has not had a transient lifestyle for at least the last 4 years and that she will accept the supervision of the Department in the event that the Court restores "Troy" to her care.

25. Before the Court on the application is an affidavit of clinical psychologist Ms Ros Sparrevohn dated 10 July 2009 (Exhibit C). That report was annexed to the affidavit of Departmental caseworker Bilal Ali filed on 4 August 2009 in the s90 proceedings brought by the mother in June 2009. The report of Ms Sparrevohn was requested by Wesley Dalmar foster agency to assess "Troy's" attachment to his long term foster carers and to determine his views regarding having contact with his birth family.

26. Ms Sparrevohn states in her report that during and interview with "Troy" she asked him if he wanted to see his birth family. The report states,

> *"'Troy' responded immediately with a definite "no" and shook his head. He was then asked if he wanted to see his brother "Kyle" and he again responded immediately with a definite "no". "Troy" was asked if there was anyone in his birth family that he would like to have contact with and he replied "there was one man that was nice but I don't remember his name". He thought for a while or so and then said "I cant remember".*

Ms Sparrevohn concludes

> *"In relation to "Troy" having contact with his birth family, "Troy" was very clear in the interview that he does not wish to have contact with his brother or his mother by stating "no" in a definite manner and shaking his head when he was asked. "Troy's" opinion in regards to contact with his birth family is consistent with what has been reported by his case manager and his foster carers. It is apparent that "Troy's" views in this matter has not changed and should be respected".*

27. I note that Ms Sparrevohn states in her report that she was informed by "Troy's" case manager at Wesley Dalmar that "Troy" had told her that he does not wish to have contact with his mother or brother. Ms Sparrevohn states that in her opinion there is sufficient evidence to conclude that having contact with his family of origin is emotionally disturbing for "Troy" and not in his best interests to pursue at this time.

28. Tendered on behalf of the mother on the application is a report of consultant psychologist Dr John Jacmon dated 28 August 2010. In that report Dr Jacmon concludes that no disorders have been identified that would be expected to detract from the mother's parenting capability and in particular no evidence emerged of drug or alcohol abuse. He states that the mother was diagnosed with anxiety at clinically significant levels in an assessment in July 2009 and that following that diagnosis she attended three treatment sessions during which she was taught skills to manage the appearance of symptoms. Dr Jacmon states that no anxiety was indicated in his assessment. Dr Jacmon states that chronic post-traumatic stress disorder emanating from childhood sexual assault appeared to have existed prior to 2008. He says that to the mother's credit she obtained treatment through Victim's Services and he is of the opinion that the mother is no longer clinically disturbed by the childhood incidents.

29. In relation to the mother's capacity to deal with "Troy's" extremely challenging behaviours Dr Jacmon states only that if the mother were to gain custody of "Troy" she would need comprehensive support as proposed in the Quovus report.

Legal principles applicable to an application for leave under s 90 (1)

30. Before coming to consider the merits of the application for leave it is relevant to consider the relevant provisions of the Care Act applicable to an application for leave under s 90 (1).

31. Section 90(1) of the Care Act provides that an application for recision or variation of a care order may be made with the leave of the Children's Court. Section 90(2) provides,

"The Children's Court may grant leave if it appears that there has been a significant change in any relevant circumstances, since the care order was made or last varied."

Section 90(2A) provides,

"Before granting leave to vary or rescind the care order, the Children's Court must take the following matters into consideration;

a) *the nature of the application, and*
b) *the age of the child or young person, and*
c) *the length of time for which the child or young person has been in the care of the present carer, and*
d) *the plans for the child, and*
e) *whether the applicant has an arguable case, and*
f) *matters concerning the care and protection of the child or young person that are identified in:*
    i. *a report under s82, or*
    ii. *a report that has been prepared in relation to a review directed by the Children's Guardian under section 85A or in accordance with section 150. "*

32. It has been held that an application for leave under s 90 (1) is not *inter partes*: **Re Edward** [2001] NSWSC 284 per Kirby J at [37] relying upon **Collins v The Queen** (1975) 133 CLR 120 at 122. In coming to that conclusion Kirby J held that an application for leave under s 90 is not an application for a "care order" (as defined in s 60 of the Care Act) and that an interim order under s 69 of the Act cannot therefore be made when the only proceedings before the court is an application for leave under s 90 (1). However, that view of Kirby J appears not to have been shared by Sully J in **Re Brett v The Children's Court of NSW** [2006] NSWSC 984 where Sully J held, contrary to Kirby J, that an application for leave under s. 90 is an application for a "care order", within the meaning of s 60, as it is an application for an order "*with respect to the care and protection of a child*". Sully J said at [53],

*"The making of a leave application is, no doubt, in one sense and from one point of view a procedural step taken in aid of a projected substantive application either to rescind or to vary current arrangements for the care and protection of some particular child or children. I do not see, however, why that consideration has the effect of depriving the leave application itself of any substantive character as a process, the precisely intended effect of which is an effect (sic) with respect to that current regime of care and protection. In so far as a correct understanding of the ratio decidendi of **Re Edward** suggest otherwise, then in my respectful opinion that ratio is erroneous".*

33. Resolution of the question whether an application for leave under s 90 (1) is or is not an inter partes application fortunately is not required in determining the current application.

The purpose of the requirement for leave under s 90 (1)

34. In ***Jasper*** [2006] CLN 2, Mitchell CM said that the purpose of the requirement for leave *"is to protect a child from contested care proceedings by ensuring that proceedings come to an end unless there is a good cause to re-open them."*

35. In ***Re Tina*** [2002] CLN 6, Mitchell CM held that there is power, in a proper case, to grant leave to a party to seek rescission or variation of a care order, not so as to put the parties at large, but to allow specific issues to be revisited; for example, contact between the parent and the child. I respectfully agree with the view expressed by His Honour and the reasons he gave.

36. In ***Re Edward*** *(supra)* Kirby J at [24] referred to the objective of the need to obtain leave before bringing an application for variation or rescission of a care order as was identified by the Minister in the Second Reading Speech introducing section 90 into the Care Act,

> *"The ability of the court to vary or rescind orders it has made in response to changed circumstances is an important feature of the court's work. However this does not have the potential to greatly expand the work of the court. A criticism of the current Act was that, regardless of the merits of the case or changed circumstances, there was no limit on the number of applications a party could file for rescission or variation. This generated significant work for the court and the Department and was often very unsettling for the child or young person. Clause 90 of this bill now provides that an application for recision or variation of an order may only be made with the leave of the court."*
>
> a. (Hansard, Legislative Assembly, 11 November 1998, Page 9762)

37. A prerequisite to obtaining leave under s90 (1) is that "*there has been a significant change in any relevant circumstances since the care order was made or last varied*" (s 90 (2)). The applicant bears the onus of establishing a significant change in any relevant circumstance. *Clause 6* of the *Children and Young Persons (Care and Protection) Regulation 2000* provides that for the purpose of s90 (2) factors which indicate a significant change in the relevant circumstances of the child or young person since the care order was made or last varied include (but are not limited to) the following;

> *a. the parents of the child or young person concerned have not met their responsibilities under an applicable care plan or restoration plan,*
> b. *a finding by the Children's Court under s82 (3) of the Act that proper arrangements have not been made for the care or protection of the child or young person.*

38. Whilst Clause 6 of the Regulation identifies some factors, which may constitute a significant change in the relevant circumstances, the provision does not purport to exhaustively define what would constitute such a significant change. In ***OM, ZM, BM and PM*** [2002] CLN 4, Mitchell CM

referred to the decision of ***Re J, K and C*** [Caselaw News Volume 2 No1 – January 2002] where Crawford CM dealt with the requirements of the Care Act as to a change in a relevant circumstance and concluded, "*as a rule of thumb*" that a "*relevant circumstance of which there has been a significant change is one of sufficient significance that if it was to be established, it would cause the court to wish to alter the existing order*". Mitchell CM went on to say,

> *"…although the date of the original order and the date of the leave application are the dates relevant to a consideration of whether or not there has been a significant change in any relevant circumstances, I think it is the whole of the relevant circumstances pertaining to those dates to which the Court will look rather than to a "snap shot" of events of those days."*

39. The meaning of significant change in any relevant circumstances was also considered in the Children's Court in ***DoCS v N*** [2001] CLN 3 where the following was said;

> *"The other aspect is that it has to be a significant change in what are relevant circumstances. A person might move their home from one home to another. Should that really make any difference to whether the order should be changed? If a parent is living with, in the case of the mother, Mr Brown rather than Mr Smith, should that make any difference if the children of the mother are in foster care? Well probably not, unless it has some impact upon the children.*
>
> *What are relevant circumstances would vary from case to case, but it seems to me ultimately what it gets down to is that it is a circumstance which underpins the original order. The Court, in having to make a decision, has a multitude of information before it, that not all of it is of equal importance. But there must be crucial aspects of it which made to Court decide one way rather than another way. That may be a combination of factors. So relevant circumstances are those important matters which underpin the order…."*

40. In ***S v DoCS*** [2002] NSWCA 151 Davies AJA said at [23] that,

> *"[A] person seeking leave for the rescission or variation of a care order is not `required to prove on such application that, if leave be granted, the person would be entitled to the order sought. The first step is simply to establish that there has been a change of sufficient significance to justify the consideration of an application for rescission or variation of the care order".*

His Honour said at [27] that the determination of whether there has been a significant change in relevant circumstances

"*requires a comparison between the situation at the time when the application was heard and the facts underlying the decision made or last varied*".

41. **S v DoCS** therefore establishes that what is required under s 90 (2) is a change of a fact or circumstance underlying the original decision which is of sufficient significance to justify the consideration of an application for rescission or variation of the care order.

42. Establishment of a significant change in any relevant circumstances, whilst a necessary condition for leave to be granted, is not necessarily a sufficient condition for leave to be granted. The court retains a general discretion to grant leave. Before granting leave, the court is required by s90 (2A) to take a number of additional specified matters into consideration. These include "*the plans for the child*" (s 90 (2A) (d)). In ***OM, ZM, BM and PM,*** Mitchell CM raised the question whether the court is required to consider all possible plans for the child, which may be put forward by an interested party. His Honour concluded, in my view quite correctly, that this was not required. His Honour said

> *"I think, though, that a full consideration in comparison of plans for a child or young person, necessitating the involvement of parties other than the applicant, is the stuff of a substantive hearing and that, in the context of proceedings for leave, all s90 (2A)(d) requires in relation to "the plans for the child" is a preliminary consideration of the plans as presented by the applicant for leave. To see s90 (2A)(d) as prompting a full and detailed inquiry is to ignore the legislative intention of providing a barrier to children and young persons and their carers against the unsettling effects of unwarranted litigation."*

43. Another matter which the court is required to take into consideration is "*whether the applicant has an arguable case*" (s90 (2A)(e)). Again in ***OM, ZM, BM and PM,*** Mitchell CM held that despite the wording of the section "*the case to be considered in that context must be the case for recision/variation rather than the case for leave".* Again that is clearly correct. As to the meaning of "arguable case" his Honour said,

> "*Perhaps the best view of "arguable case" where it appears in s 90 (2A)(e) is that it means the same thing as "probability" as defined by Mahoney JA [in* ***Shercliff & Anon v Engadine Acceptance Corp****. [1978] 1 NSWLR 729] and "reasonable prospect" and falls somewhat short of prima facie case. It certainly falls far short of a case established on the balance of probabilities. It seems to me to be inconsistent with s 90 as a whole and with the evident intention of Parliament that, in the context of an application for leave, consideration of any of the factors raised by sections 90 (2) and 90 (2A) necessitates findings beyond the level of prima facie findings*".

44. In **Shercliff & Anon v Engadine Acceptance Corp** Mahoney JA was considering the meaning of a "*prima facie case*" as the basis for the making of

an interlocutory injunction: see **Beecham Group Ltd v Bristol Laboratories Pty Ltd** (1968) 118 CLR 618. In **Beecham** the High Court made clear that the term "prima facie" was used "*in the sense that that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief*". Mahoney JA said that here the court is not looking at the term "probability", as necessarily in the sense of "*more likely than not*", but perhaps as something less than that. His Honour rejected a submission that probability means "*more likely than not*" and cited Lord Reid in **Koufos v Czarnikow Ltd** [1969] 1 AC 350 at 383 who was prepared to see a probability as something with "*considerably less than an even chance*" of occurring.

45. In **Re Nerida** [2002] CLN 7 Dive SCM said this about an arguable case,

> *"The Macquarie Concise Dictionary defines arguable as*
> 1. *capable of being maintained, plausible*
> 2. *open to dispute or argument*
> 3. *capable of being argued*
>
> *An "arguable case" is clearly a far lesser test than a prima facie case test or a "more probable than not" test. In my view an "arguable case" test indicates a requirement for the applicant to put material before the court which shows that there is a plausible case which requires or deserves further consideration in a substantive hearing*".

46. However, in **Beecham** and **Shercliff** the meaning of the expression "*arguable case*" was not under consideration. The meaning of that term was, however, considered by the Full Court of the Supreme Court of Western Australia in **Demptser v National Companies and Securities Commission** (1993) 9 WAR 215. The court considered the meaning of "arguable case" as it appears in s 187 (1) of the *Justices Act* 1902 (WA). S 186 (1) of that Act provides that an application for leave to appeal from a decision of a justice may be made only on certain specified grounds. Section 187 (1) of the *Justices Act* provides that,

> "*The judge shall grant leave to appeal unless he considers that the appeal is frivolous or vexatious or that the grounds of appeal advanced do not disclose an arguable case"*.

47. In **Dempster** Malcolm CJ said at 262,

> *"It was contended on behalf of the appellant that the expression "arguable case" in s 187 (1) meant "capable of being arguable" (see The Shorter Oxford Dictionary). In my opinion, having regard to the context, an arguable case is one that is not merely capable of being argued, but one that is reasonably capable of being argued in the sense that it has an argument which has some prospect of success. In this context 'arguable case' necessarily has the same meaning as 'reasonable case' as that expression is used in O 20 r 19 of the Rules of the Supreme Court 1971.*

The case must be one which has some chance of success: see Republic of Peru v Peruvian Guano Co (1887) 36 Ch D 489 at 495".

48. In ***Re Matthews; Ex Parte Harrison*** [2001] WASC 61 McKechnie J said at 27,

"I bear in mind that a single Judge does act as a filter to the Full Court in some respects. At its logical extension, a case may be said to be "arguable" simply because someone can be found to argue it. I do not consider the interests of justice require a test so low and, with respect, prefer to adopt by analogy the formulation of Malcolm CJ that "...an arguable case must have an argument with some prospect of success." That is the test I propose to apply in the present case."

49. I agree that a formulation of an arguable case as being a case "capable of being argued" is not the appropriate test. As McKechnie J said in **Re Matthews** this would mean that a case is arguable simply because someone can be found to argue it. In my view, the meaning of "arguable case" as formulated by Malcolm CJ in **Dempster** is an appropriate formulation to be adopted in determining whether an arguable case has been established under s 90 (2A) (e) of the Care Act. The applicant for leave must establish that he or she has an argument that can reasonably be argued and has some prospect of success.

50. Because an arguable case must relate to the case for rescission or variation rather than the case for leave, in determining whether an applicant has an arguable case the court should take into account the matters in s 90 (6) of the Care Act which are to be taken into account on the substantive application for variation or rescission. These include,

(b) the wishes of the child or young person and the weight to be given to those wishes

(d) the strength of the child's or young person's attachments to the birth parents and the present caregivers, and

(f) the risk to the child or young person of psychological harm if present care arrangements are varied or rescinded

Other relevant considerations upon an application for leave under s. 90 (1)

51. There are other provisions of the Care Act, which must be taken into account when the court comes to consider an application for leave under s. 90 (1). The court must take into account the objects of the Care Act as set out in s 8 and the principles for administration of the Act as set out in s 9. In particular, the court must bear in mind, pursuant to s 9 (1), that in determining whether leave should be granted the safety, welfare and well-being of the child or young person are paramount. Of particular significance upon an application

for leave under s 90 (1), is the least intrusive intervention principle set out in s 9 (2) (c). As to the application of s 9 (2) (c) of the Care Act to an application for leave under s 90 (1) in **Re Louise and Belinda** [2009] NSWSC 534 Forster J said at [54],

> "*In my opinion the section is ambulatory. In the case of a care application made under section 60 of the Act, it has the effect of requiring the court to be reluctant to remove a child from its natural parents unless there is compelling reason to do so. On the other hand, where an application is made not under section 60, but under section 90, for the rescission or variation of a care order, the sub-section has a different effect. In that case, the least intrusive form of intervention would normally mean not interfering with existing care arrangements. Needless to say, the force of the requirement of section [9 (2) (c)] will vary from case to case, and a court will undoubtedly have regard inter alia to the strength of the respective bonds that a child may have with his or her natural parents and his or her foster parents".*

52. I now come to consider whether leave should be granted in this case. It is necessary to refer to the judgment of Judge Coorey delivered on 12 December 2007 when his Honour granted the mother leave under s. 90. His Honour states that the basis of the original intervention was homelessness and neglect on the part of the parents and that it was on that basis that the Children's Court made final orders in April 2005. In finding that there had been a significant change in relevant circumstances his Honour appears to have accepted that the mother had found accommodation, that there was an absence of drugs, that there had been an ending to the relationship with the father, that the mother was caring for her new child "Tracey" and that she had successfully completed courses. In granting leave his Honour stated that he had been worried by the evidence that the children have stated that they do not wish to see their mother, however, his Honour stated that "*that need not be the sole determiner. It seems to me that children's attitudes do change. It may not always be the case*".

53. Upon the application the mother points to the following as significant changes in relevant circumstances:

1. That she has lived in the Allambie area for the past two years and that she has been in receipt of a housing subsidy for the past four years. She states that she lived in two previous homes in the Allambie area for 6 months each and that she moved into her present home on 31 May 2010 with a 6 months lease. She states that the home is a large home and that there is a bedroom available for "Troy".

2. That she is in receipt of a single parent pension and pays all her household bills in a timely manner.

3. That she has the capacity to care for "Troy" with the support of her family.

4. That she does not consume any illegal drugs or substances and has never done so.

5. That the Department is in breach of court orders made on 28 October 2008 in that she has not been allowed to have contact with "Troy" since late 2008. (In that regard it is to be noted that the contact order was conditional upon and subject to "Troy's" wishes with regard to contact and the evidence is that "Troy" has consistently stated that he does not wish to have contact with his mother).

54. In my view none of the above matters can be characterised as a significant change in a relevant circumstance. In relation to housing the mother has only been in her current accommodation for just over three months. She has a long history of instability with respect to her housing and she has not demonstrated that she is able to remain in stable accommodation for any extended period. Accordingly, I am unable to conclude that the mother does have the capacity to care for "Troy" even if she has some support from her family.

55. In relation to her assertion that she has never used illegal drugs the mother has not put sufficient evidence before the court to establish that she has never used illegal drugs. In any event, on the mother's account as she has never used or consumed illegal drugs or substances there is no significant change in a relevant circumstance.

56. In relation to the mother's allegation that the Department is in breach of the contact orders made on 28 October 2008, as I have stated above contact has not occurred because of the stated wishes of "Troy".

57. Even if I were to be satisfied that the mother has demonstrated a significant change in a relevant circumstance there is a very powerful consideration militating against the granting of leave in this case and that is the consistent statement by "Troy", now a 9 year old boy, that he does not wish to have contact with his mother. At his own request "Troy" has had no contact with his mother since late 2008. When Judge Coorey granted leave to the mother in December 2007 he stated that the evidence that "Troy" did not wish to have contact with his mother worried him. However, his Honour expressed the view that it was possible that "Troy" may change his views. Almost three years later "Troy" has not changed his views and continues to express his wish not to have contact with his mother.

58. Taking into account the matters in s 90 (2A) of the Care Act I place particular weight upon the age of "Troy" and his consistently expressed wish not to have contact with his mother; I take into account that the mother has not put forward any plan as to how she proposes to address "Troy's" extremely challenging behaviours nor does she put forward any proposal as to how she plans to cope with those behaviours.

59. It is also necessary to take into account pursuant to s 90 (2A) (e) whether the mother has an arguable case. As I stated earlier, in determining whether

there is an arguable case it is appropriate to take into account the matters in s 90 (6) which include (b) the wishes of the child and the weight to be given to those wishes, (d) the strength of the child's attachments to the birth parents and (f) the risk to the child of psychological harm if present care arrangements are varied or rescinded. I am clearly of the view that any disturbance of the present intensive intervention for "Troy", particularly to return him to the care of his mother, would create a significant risk of psychological harm to "Troy".

60. In my view the mother does not have an arguable case, as it cannot be said that she has a case which can be reasonably argued and which has some prospect of success. Clearly, the absence of an arguable case on an application for leave under s. 90 (1) must result in the application for leave being refused.

61. Further, as was explained in **Re Louise and Belinda** (supra) with respect to an application for leave under s 90 (1) the least intrusive principle contained in s 9 (2) (c) of the Care Act would normally mean not interfering with existing care arrangements. In the present case, given "Troy's" difficult history in foster placements, his extremely challenging behavioural problems and the fact that he is presently responding well to the one-on-one intensive support residential placement with Allambie Services I am strongly of the view that any disturbance of the present care arrangements will be highly detrimental to "Troy's" welfare. Pursuant to s 9 (1) of the Care Act I am satisfied that the granting of leave would be inconsistent with the paramount interests of the safety, welfare and well-being of "Troy".

62. As was stated by Mitchell CM in **Jasper** the purpose of the requirement for leave under s 90 (1) "*is to protect a child from contested care proceedings by ensuring that proceedings come to an end unless there is a good cause to re-open them*". I am clearly of the view that no good cause has been demonstrated by the mother to re-open the proceedings.

Accordingly, I make the following order:

The application for leave is refused.